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# SUPREME COURT OF UNITED STATES

## OCTOBER TERM, 1904.

Nos. 3 and 4.

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ALBERT HUEGIN,
PLAINTIFF IN ERROR,

*vs.*

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

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ANDREW J. AIKENS,
PLAINTIFF IN ERROR,

*vs.*

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

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## REPLY BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

Counsel for the State begin their brief with a concession of the correctness of the statement of Judge Cooley relative to the right to refuse contract relations, but qualify this concession by averring that the law as thus stated relates to "individual and independent action." This idea runs all through the brief, cropping out in various forms of statement, in nearly every chapter. Can any such limitation be put upon the rule in question? Not every legal right is a constitutional right, but this right to refuse to contract is a constitutional right (*State vs. Julow, &c.*, p. 99 et seq. our brief) essential to the liberty to contract; and quite beyond this, also essential to the exercise of the right of competition. If we look into the reason of this

rule admitted by counsel for the State, we discover at once that the rule is based upon considerations which show his proposed limitation of the rule to "individual and independent action" to be unsound. The reason for the rule in considering the liberty of contract is that it would be subversive of such liberty if those to whom a contract was proposed could only refuse when their motives were proper or when the state approved their refusal, or, what is the same thing, could only annex such conditions to such refusal as the authorities thought beneficial to the person refusing.

The reason for the rule in considering the right to engage in trade competition is that the latter right is essential to liberty—not alone liberty to make contract, but to pursue a lawful avocation and struggle for one's living. And this competition could not be exercised if the motives accompanying the exercise of any act of competition which involved a refusal to contract could be inquired into. Now both the above things, contract and competition, can only be carried on by consultation, combination and acts which are at some point of the transaction, if not at all points, connected with the co-operation and combination of other persons interested in the subject matter of the contract or interested in the competition. Consequently the limitation proposed by the State to be within its police power is a limitation which destroys the liberty of contract and the right to competition. This might be destroyed under the police power if it came within the acts inimical to public health, morals or welfare. We have cited the authorities to show that such transactions do not come within the limits of the police powers, because they do not affect the public injuriously, etc.

## II.

As we understand Chapter I, pp. 5 to 14, of the brief for the State (and we have faithfully tried to understand it), that chapter is intended to support the proposition that if the state statute properly interpreted be not unconstitutional as depriving one of liberty or property, and the decision of the state court

lays down no unconstitutional general rule governing all cases, the plaintiff in error could not complain to this court, even if by erroneous determination of fact, or erroneous decision of law in the instant case, they were deprived of liberty or property without due process of law. This, we submit, is manifestly incorrect and contrary to the rules of this Court.

*Chicago, &c., Ry. Co. vs. Chicago,* 166 U. S. 226, citing and explaining

*Scott vs. McNeal,* 154 U. S. 34, and other cases.

## III.

The whole argument on the part of the State contained in (Chapter II, pp. 14 to 27), seems to us to rest on the premise that there was alleged in the information (Printed Record, pp. 16, 17, 18) a combination for the purpose of "regulating and controlling prices." If this premise is not correct this part of the argument for the State falls and the cases cited by the State in this chapter are not apposite. The information tells us of the business in which each person was engaged, that the Journal Company raised its rates about twenty-five per centum over *its former rates,* and the accused thereupon, without prescribing any prices that any or either of them should charge to the general public, without any agreement of uniformity of prices as between themselves and without fixing any price for either of the persons agreeing with reference to his base upon which to compute a twenty-five per centum advance, did agree that they would refuse to contract with those who paid or agreed to pay the Journal Company its raised rates except upon condition that such person would patronize all three papers of the accused and pay to each for such advertisement an advance of twenty-five per centum over *its former rates.* If such person withdrew from the Journal and went over to the accused, or merely refused to pay the Journal its advanced rates, which we may assume is the same thing, then he could come in among the other patrons of either or all of the accused newspapers. If this can be considered "regulating and controlling prices," it must

be in the same sense that all competition regulates and controls prices. Because the prices it tends to control are not the prices of the parties to the compact, but the prices of their competitors. But in every decision condemning contracts for the purpose of "regulating and controlling prices" there will be found by express language or necessary implication this qualification, namely: "except by competition." So that we must inquire whether there is in this situation any element of an agreement to regulate and control prices otherwise than by competition. It would be indeed strange if the State in its police power claimed and had the right to prohibit such contracts above named on the ground that they were subversive of competition, and at the same time claimed and had the right to prohibit contracts which were in themselves the necessary agencies of competition. Somewhat similar use was attempted to be made of the anti-trust law in *Whitwell vs. Continental Tobacco Co.*, 125 Fed. Rep. 454, but the court of appeals showed that the law could not be so perverted. And we submit further that the Northern Securities Company case, 24 Sup. Ct. Rep. 436; 193 U. S. 197, so liberally quoted from on pp. 19 to 23 of the brief for the State, is against the contention made in that brief instead of in favor of, so far as that case has any application at all. That is, it is against the contention of the State because it speaks for the paramount importance of and upholds the right of competition. Observe that on page 23 of the brief for the State is printed in large capitals an excerpt from this opinion conceding that the states possess authority to guard against combinations that repress individual enterprise and interfere with the operation of the natural laws of competition. We do not exactly understand why this is quoted or why it was thought entitled in this case at bar to the distinction of capitals. It is no doubt correct that the states possess such power. But what are the natural laws of competition? Not like the laws of gravitation or inertia, but economic laws based on human desires and on nothing else. Are they not fostered by that which gives freedom to activity and endeavor prompted by these desires, and hindered by the basic position of the counsel for the

State in his brief? That is, that no two or more persons shall co-operate in competition.

IV.

An examination of the brief of counsel for the State discloses (Chapters V and VI) that it has great doubts of our seriousness and (pp. 2, 3, 7, 8, 9, 10, 16, 17, 20, 21, 22, 23, 24, 31, 32, 34, 35, 36) great faith in quotations. Inaccurate as our use of language may be in portions of our brief, we believe there can be nothing found in it quite so bad as that of the "elaborate" note from which the State quotes at pp. 2 and 3 of its brief. That note affirms that the weight of authority supports the proposition (1) that one *who suffers damage* from an act not constituting a *legal injury* cannot maintain an action against him who does such act with malice and bad motive. (2) But if one with the sole and malicious purpose of *injuring* another and without any benefit, interest or *pleasure* (other than he derives, etc.) to himself or to others, commits *"an act which if done in good faith would be justifiable,"* he is liable in an action, etc. This is indeed "elaborate." What does "injuring" mean? Is proposition (2) to be taken to contradict or to engraft an exception upon proposition (1)? What kind of an act is "an act which if done in good faith would be justifiable"? Does (2) refer to the acts "not constituting a legal injury" in proposition (1)?

Had we first caused our brief to be printed as an elaborate note to some decision and then presented it in quotations, the State would have, no doubt, more confidence in our seriousness.

V.

The criticism on pp. 12 and 13 of the brief for the State upon the plea and the word "injuring" therein, we submit is not well taken, because the plea must be construed with reference to the information. The only "injury" claimed in this information is that of depriving the Journal Company of customers. Consequently this is the only "injury" admitted by the plea.

VI.

The quotation from *Dels vs. Winfree* on brief for the State (p. 37), must be limited to "influencing others" who are not themselves co-operating in competition.

VII.

The positions of the State are in many respects inconsistent and contradictory, as we will point out in the oral argument, and are wholly in negation of the proposition from *State vs. Dalton*, 22 R. I. 77, cited and approved in *State vs. Dodge*, 56 Atl. Rep. 984 op. viz:

"It is not enough to bring a given business within the prohibitory power of the legislature that it is so conducted as to seriously interfere with or even destroy the business of others."

This decision covers the police power of the State. Can this highest court deny it without opening the floodgates of hostile and socialistic legislation throughout the union?

Respectfully,

GEO. D. VAN DYKE,
W. H. TIMLIN.